Petition

81-541

No.

Office - Supreme Court, U.S.
FILED
SEP 16 1981
ALEXANDER L. STEVAS,

In the Supreme Court of the United States

OCTOBER TERM, 1981

GINO MARTIN, a/k/a "Blacky",

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the pretrial motions filed by defendant, including a request for production by the government of the names of all potential witnesses, together with their statements which "might be helpful to the defendant's case * * *", and motions describing the particular importance of ascertaining the date of the alleged offense, followed by a request during trial for the transcript of the grand jury testimony of a named person, proposed to be called by the defense, was a specific request within the meaning of *United States* v. *Agurs*, 427 U.S. 97 (1976), as the District Judge explicitly found?

2. Whether a defendant must assign specific reasons for requesting the grand jury transcript of a named individual, as a prerequisite to the request being deemed "specific," where the defendant has made known to the District Judge and government counsel, in his pretrial motions, the importance of evidence placing the date of the alleged offense prior to the time when the government claims it has occurred, the grand jury transcript contains such evidence, and all concerned know what the defendant is looking for and its importance to the defense theory of the case?

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THE UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Gino Martin, prays that a Writ of Certiorari be issued to review the final judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on August 13, 1981.

OPINIONS BELOW

The unpublished opinions of the United States District Court for the Northern District of Indiana, Hammond Division, and of the United States Court of Appeals for the Seventh Circuit are reprinted, *infra*, as Appendices I and II respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on June 10, 1981. (App. III, *infra*) A timely Petition for Rehearing and En Banc Suggestions was denied on August 13, 1981. (App. IV, *infra*) This Petition is filed within the time permitted by Rule 20 of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Pretrial Proceedings

On August 14, 1979, the United States Grand Jury for the Northern District of Indiana, Hammond Division, returned a one-count indictment charging Gino "Blacky" Martin with unlawfully receiving miscellaneous jewelry and diamonds of the value of $5,000 or more "in or about August, 1974," which jewelry was moving as, was part of, and constituted interstate commerce between Kentucky and Indiana. (R. 1)[1]

Prior to trial, the defendant filed a motion for discovery and inspection requesting, *inter alia*, production by the government of the names and addresses of all potential witnesses, together with their statements (other than the statements of prospective witnesses for the Government), which "might be helpful to the Defendant's case * * * *" (R. 10; p. 2) Concurrently, the defendant moved for a Bill of Particulars setting forth, *inter alia*, "the exact date, time and place the Defendant allegedly received miscellaneous jewelry and diamonds." (R. 12; p. 2) Finally, the defendant moved to dismiss the indictment for its failure to allege, with specificity, that the offense occurred within the applicable statutory period of limitations, that is, within five years prior to the date of the return of the indictment. (R. 17)

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[1] "R.___" references are to the page of the Original Record below.

In response to the defendant's requests, the government claimed that discovery of statements of persons other than prospective government witnesses was precluded by either the "work product" provision of Rule 16(a)(2), or the defendant's failure to make a showing that his request was reasonable and material to the preparation of his defense. (R. 21; p. 3) However, the government acknowledged its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to disclose evidence favorable to the defendant where the evidence is material to guilt and in the possession of the government, but announced an unawareness of the existence of any such evidence. (R. 21; p. 5)

The government also answered that the receipt alleged in the indictment occurred between August 24 and 31, 1974, in Gary, Indiana. (R. 23; p. 3) This same answer was also offered in response to the defendant's motion to dismiss the indictment for its failure to allege that the offense occurred within the statutory period of limitations. (R. 27)

The District Court denied the defendant's motion to dismiss the indictment based on the failure to allege a date specifically within the limitations period. Relevant particulars were ordered, but the government was not ordered to produce the statements of non-witnesses. (Tr. 10/4/79—pp. 143-8)[2]

Evidence

On August 23, 1974, Richard Biggerstaff, James Corbett, and two other men committed an armed robbery in a home in Evansville, Indiana. Two diamond earrings, weighing approximately 2 carats each, along with other items were taken in this robbery. (Tr. 94-5, 97, 234, 238, 395-6) The earrings had a value in excess of $5,000. (Tr. 394, 413-14, 417, 408-10)

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[2] "Tr. ---" references are to the Transcript of Proceedings filed in the Court below.

The proceeds from the Evansville robbery were taken to Corbett's home in Henderson, Kentucky, where Biggerstaff removed the diamonds from the earrings. (Tr. 95, 238) Biggerstaff took the diamonds to Newberg, Indiana, and tried, unsuccessfully, to sell them. He brought the diamonds back to Henderson, Kentucky, and then, on Sunday, August 25, 1974, took the stones to his home in Hobart, Indiana for the purpose, he said, of combining them with jewelry he had stolen in Kentucky and Indiana and trying to sell everything at one time to "Blacky."[3] (Tr. 96)

On Monday, August 26, 1974, Biggerstaff told Jack Berbesque to contact Blacky Martin, that he had stolen diamonds to get rid of and that he would give Berbesque 10% of what the diamonds sold for. Berbesque was to contact Martin and call Biggerstaff when he had done so. (Tr. 98)

Biggerstaff waited four days for Berbesque to call him back, but Berbesque never did.

On Friday, August 30, 1974, Biggerstaff went to a clothing store that was beneath Berbesque's apartment and saw

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[3] In July, 1974, Biggerstaff, Corbett and two others committed a home invasion robbery in Lackey, Kentucky. (Tr. 93, 217-18) Various items of jewelry were taken in this robbery. (Tr. 94, 220) In August, 1974, Corbett and two other men committed a burglary in Newberg, Indiana. (Tr. 221) Items of jewelry were also taken during this offense. (Tr. 231-33)

Apparently because the jewelry taken in these offenses was never valued, and because of a later-appearing discrepancy between Corbett and Biggerstaff concerning what was sold to the defendant, the District Judge instructed the jury at the conclusion of the case that "the evidence would permit a finding that the goods allegedly received had a value of $5,000 or more only if you find beyond a reasonable doubt that the items so received included both the large diamonds stolen in the Evansville robbery." (Tr. 660)

George Petroff.[4] Biggerstaff asked Petroff to contact Martin to tell Martin that Biggerstaff wanted to see him. (Tr. 98-100)

Later that morning, Petroff told Biggerstaff he had contacted Martin and was to call Martin back at 11 that morning to see if arrangements could be made. Biggerstaff called Petroff at 11 and was told to come in late that night. (Tr. 100)

Biggerstaff met Corbett at approximately 8 or 8:30 p.m. on Friday, August 30, at the Two Sisters Restaurant in Gary, Indiana. (Tr. 101, 172) Biggerstaff and Corbett went to the clothing mart next door, where they met Petroff. (Tr. 101-02, 248-9) Petroff told Biggerstaff that Martin was upstairs. (Tr. 102) He then led Biggerstaff and Corbett upstairs, where Martin was sitting at a desk, examining jewelry. (Tr. 102) According to Biggerstaff, only he and Corbett entered the office area; Petroff was "still down in the clothing section, where the Clothes Mart was, the Clothes Mart proper." (Tr. 107) According to Corbett, the man who led them up to the area (Petroff) entered the area, "turned left right by the desk," and told the man behind the desk, "Blacky, here's the guys." After the introduction, which took a matter of seconds, Petroff left. (Tr. 250-1)

Thereafter, according to the somewhat varying accounts of Biggerstaff and Corbett, negotiations for the sale of numerous items of jewelry that was in a bag took place.

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[4] Petroff did not testify at trial. The government's failue to disclose Petroff's grand jury testimony, in which he contradicted much of Biggerstaff's testimony and placed this meeting as conceivably in July, 1974, before the Evansville diamonds were even stolen, was the subject of considerable post-trial proceedings, and is the "factual event" upon which this Petition is based.

At the conclusion of negotiations, as Corbett and Biggerstaff discussed what should be done with jewelry which Martin said he did not want, Petroff walked into the room. (Tr. 115-16) Biggerstaff then said to Corbett, "you know Square [Petroff] has got to get paid his ten percent." (Tr. 117) Corbett agreed, they asked Martin if it was all right, Martin said it was, "and Petroff took the stuff." (Tr. 117)

Martin did not pay Biggerstaff at the time. According to Biggerstaff, Martin said he was going to take the gems home and bring the money in the morning. Biggerstaff said: "I instructed Square—I knew Square would pay me if the guy never showed up again, Square would pay me, so I let him take them home." (Tr. 119)

According to Biggerstaff, Martin took the two diamonds from the Evansville robbery and placed them in his briefcase. (Tr. 110) Petroff took the other items. (Tr. 117)

On the next day, Biggerstaff received $3,000 from Petroff while the two of them set in a car in front of the Two Sisters Restaurant. (Tr. 123-5)

Biggerstaff was arrested for the Evansville robbery on September 29, 1974. (Tr. 125) He was prosecuted, convicted and sentenced to the Indiana State Penitentiary for two concurrent 25 year sentences, but was incarcerated on those sentences for a period of four and one-half years. (Tr. 87)

However, he did not spend the entire four and one-half years in the Indiana State Penitentiary. In 1975, following his conviction for the Evansville robbery, Biggerstaff began cooperating with the government by contacting an F.B.I. agent and offering information about various crimes in which he had participated, or about which he had knowledge. (Tr. 88, 143-4) In 1976, he pleaded guilty to a theft from an interstate shipment which had occurred in 1974.

That plea resulted from a bargain entered into with the United States Attorney for the Northern District of Indiana, whereby that office recommended a sentence of no more than three years. Biggerstaff was sentenced to a term of one year to run concurrently with the state sentence he was then serving. Biggerstaff testified for the government in December, 1976, in another matter. (Tr. 88-9, 144) As a result, the United States Attorney sent Biggerstaff's attorney a letter setting forth his estimation of the extent of Biggerstaff's cooperation. (Tr. 89-90)

In 1977, Biggerstaff pleaded guilty in the United States District Court for the Northern District of Illinois to conspiracy to commit theft from an interstate shipment. That plea was also the result of an agreement with the United States Attorney's office, whereby Biggerstaff again agreed to cooperate and the government agreed to recommend no more than three years. He was sentenced to a term of two years to run concurrently with the state sentence he was still serving. Biggerstaff again testified for the government in 1978, and a letter of cooperation was sent on his behalf by a Strike Force attorney to the Parole Commission and the Clemency Commission. (Tr. 90-2)

Biggerstaff first told government agents in either February or March, 1978 about the alleged sale of the Evansville diamonds to Martin (Tr. 184, 153), although he might have mentioned it earlier. (Tr. 154)

Later, the Indiana judge, principally as a result of the letters that had been written in Biggerstaff's behalf, reduced Biggerstaff's sentences to 17 years and he was made eligible for immediate parol. He was thereafter paroled and discharged from his 25 year sentences. (Tr. 92-3,

140) At the time he testified in this case, Biggerstaff was a free man.[5] (Tr. 181)

Corbett was never prosecuted for his role in the Evansville robbery. He was questioned by F.B.I. agents about the case in October, 1978, while he was serving a sentence for another offense.[6] At that time, he insisted upon being

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[5] Biggerstaff's criminal record dated back to 1958, when he was placed on probation for carrying a pistol without a permit. (Tr. 85, 128) In 1964, he was placed on one year probation for a charge of auto theft, reduced from a felony to a misdemeanor. (Tr. 86, 128) In 1965, he was convicted of theft of property, a felony, and again placed on two years probation. (Tr. 86, 129) In 1971, he was convicted of conspiracy to committ kidnapping and sentenced to a term of two to fourteen years in the Indiana State Penitentiary. He served two and one-half years of that sentence and was then released on parole. (Tr. 86-7, 129)

[6] Corbett, too, had an extensive criminal background. In 1964, he was convicted of theft without felonious intent, a misdemeanor reduced from a felony charge of breaking in a dwelling house. He was fined as a result of this conviction. (Tr. 208, 262-3) In 1968, Corbett was sentenced for theft of tires, a misdemeanor, and sentenced to sixty days on the Indiana State Farm and a fine. (Tr. 208, 263-4) In 1969, he was convicted of a storehouse break-in and placed on one year probation. (Tr. 209, 264) In 1970, he was convicted of the burglary of a residence and sentenced to three years in the penitentiary. (Tr. 209, 265) In 1972, he was convicted of first-degree burglary for which he received a suspended sentence and two years probation. His parole from his preceding sentence, however, was revoked and he returned to Kentucky, where he served approximately one year in various penal institutions. (Tr. 210, 266-7) In 1975, he was convicted of a storehouse break-in and sentenced to life imprisonment as an habitual criminal. Corbett was still serving his sentence at the time he testified. He was eligible for parole in November, 1980. He was told he would receive a letter from the government describing his cooperation. (Tr. 211-12, 268-9, 328-30)

immunized before cooperating with the government, although he discussed this case "very briefly" with the interviewing agents. (Tr. 212-16, 275-77) During this interview, Corbett told the agents that he was present when Biggerstaff sold the jewelry from the Evansville robbery to "Blacky Diamond." He did not describe the store where the incident allegedly took place. He did not recall describing the jewelry that was allegedly sold. He did not say anything about earrings or diamonds specifically—only about jewelry. (Tr. 279-82) Finally, he did not tell the agents he was involved in the robbery. He did this only after he was "promised" immunity. (Tr. 323)

On July 24, 1979, F.B.I. Agents interviewed Martin at the latter's place of business in Oak Lawn, Illinois. (Tr. 347, 372) One agent asked Martin if he knew George Petroff, Jack Berbesque or Richard Biggerstaff, and Martin replied that he did. The agent asked if Martin had ever purchased jewelry from Biggerstaff. Martin replied that he had, but that it was of no great value. Asked when he had purchased this jewelry, Martin said it had been years ago. The agent asked if it could have been in 1974, and Martin said it could have been. (Tr. 351, 375) The agent asked if Martin knew that the jewels he purchased from Biggerstaff were stolen, and Martin replied that Biggerstaff did not "present it to him that way." (Tr. 352, 375) Martin then explained that the purchase had been made at a restaurant in Gary, Indiana, and the agent asked if it could have taken place in a clothing store. Martin said it could have, but he thought it was a restaurant. (Tr. 352, 376)

Shortly before the government rested its case in chief, defense counsel asked that the District Judge order that the government turn over to the defense the grand jury testimony of George Petroff, who had testified before the

Grand Jury which returned this indictment on the day that it did so. At the time the motion was made, Petroff was present in the courthouse, having been subpoenaed both by the government and the defense. Defense counsel's motion was prompted by advice from the government that it did not intend to call Petroff as its witness and by counsel's own expressed desire to call Petroff as a defense witness. (R. 12; App. I, pp. 8-9, *infra*)

The District Judge denied the motion for production of Petroff's grand jury testimony, although he did rule that the government would be required to produce that testimony after direct examination, if Petroff testified as a defense witness. However, Petroff did not testify, and his grand jury testimony was not produced during trial. (R. 56; App. I, p. 9, *infra*)

The defense had interviewed Petroff one week prior to trial.[7] That interview had revealed that Petroff had arranged a meeting between Biggerstaff and Martin in June or July 1974. The description of the meeting given by Petroff varied with the descriptions given by Biggerstaff and Corbett, not only as to date, but as to circumstances. Petroff said he saw Biggerstaff walk toward his place of business from the Two Sisters Restaurant, walk up to Jack Berbesque's apartment, walk back down, peek into his store, walk back to the restaurant, walk back upstairs and then walk into the store. Petroff then asked Biggerstaff if he could help. Biggerstaff said that Berbesque was supposed to help. He

[7] Trial counsel for the defendant submitted a copy of the statement taken by him from George Petroff to the District Court in conjunction with the Court's consideration of post-trial proceedings. (R. 55) The District Judge ordered that the transcript of that interview be marked Defendant's Exhibit C and that it be sealed. (R. 56, p. 1; App. I, p. 8, *infra*)

then asked Petroff if he could get a hold of "Blackie" for him. Petroff said he called Martin at his home in Oak Lawn, Illinois, and told him one of Berbesque's friends wanted to see him. Martin said he would be there in about an hour and, after about an hour, he came into Petroff's store. Martin asked where the man who wanted to see him was, and Petroff told him he was at the restaurant and described Biggerstaff. Martin went to the restaurant and, in a couple of minutes, returned to Petroff's store with Biggerstaff. Martin asked if they could use a room in back and above the main floor of the store, and Petroff said he could. (D. Ex. C, pp. 6-9) This meeting occurred at approximately 7 p.m. and lasted approximately thirty to forty-five minutes. The meeting concluded prior to eight o'clock, when Petroff closed his store. Neither Biggerstaff nor Martin ever told Petroff what occurred at the meeting. Biggerstaff never told Petroff that he had stolen diamonds or any jewelry to sell. (D. Ex. C, pp. 11-13) Petroff did not go into the room while Biggerstaff and Martin were there. To Petroff's knowledge, no one else was present with Martin and Biggerstaff. Martin and Biggerstaff left the store together. Petroff did not pay any money to Biggerstaff, nor did he receive anything from him. (D. Ex. C, pp. 14-28)

Petroff's grand jury testimony was substantially similar to the statement given defense counsel, with the exception that Petroff also told the Grand Jury that the only time, after this incident, that he saw Biggerstaff was when he "might have" run into him in the restaurant, although he doubted that he had done so. (D. Ex. B, pp. 18-19; see also, p. 35)

Dr. Marvin Ziporyn, a well qualified psychiatrist specializing in forensic psychiatry, testified on behalf of the defense that, based on his observing and listening to Biggerstaff testify in another case in 1976 and upon his re-

viewing correspondence written by Biggerstaff, grand jury testimony given by Biggerstaff, and testimony given by Biggerstaff in a third case, he had an opinion that Biggerstaff was a paranoid personality and could not be relied upon to tell the truth. (Tr. 474, 476-80) Ziporyn described a paranoid personality as one who would, under certain circumstances, deliberately prevaricate and utter falsehoods in order to obtain a personal objective, without regard for the ethical or moral implications of doing so. (Tr. 480)

The defendant testified that he had moved into a retail establishment in January 1979. (Tr. 544-6) Prior to that time, he conducted his diamond brokerage business out of his home, working on "referrals" and purchasing or selling jewelry at a client's home or place of business. (Tr. 548) As a result, he often bought diamonds in many places, from people he had never met before. (Tr. 560, 564)

Martin had known Petroff since approximately 1969. Petroff had referred persons to Martin on approximately 12 occasions. Martin conducted business with these persons in the offices of Petroff's clothing store. (Tr. 549) He had made several sales at Petroff's office, but he had purchased jewelry there only once. (Tr. 560)

On one occasion, some time between 1970 and 1974, Petroff arranged a meeting at the clothing store between Martin and Biggerstaff. He had met Biggerstaff once or twice before that. (Tr. 549-50)

Biggerstaff and Petroff were present throughout the course of the meeting. No one else was present. Martin never saw Corbett prior to Corbett's testifying in this case. The meeting between Biggerstaff and Martin, which took place in Petroff's office, lasted approximately twenty minutes. Biggerstaff showed Martin some rings and

watches and Martin examined them. He bought three rings, each of which had diamonds in them. Biggerstaff did not show him any loose diamonds. (Tr. 550-2)

The largest stone in the rings which Biggerstaff showed Martin was approximately a carat. Biggerstaff volunteered that he had inherited this jewelry. (Tr. 554) Martin bought the rings for $2,500 in cash. Biggerstaff had asked for cash. It was not unusual in Martin's business to pay cash for jewelry. (Tr. 555-63, 581) Biggerstaff never said these rings were stolen. (Tr. 556)

The defendant was found and adjudged guilty and sentenced to the custody of the Attorney General for a period of five years. A notice of Appeal was timely filed to review this judgment. (R. 46)

Post Trial Proceedings

Thereafter, on December 5, 1979, pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure, the District Court stayed the Notice of Appeal pending final ruling on certain timely filed post-trial motions. Memoranda were filed by the parties addressing the failure of the government to turn over to the defense, after specific request during trial, the Grand Jury testimony of George Petroff. A hearing was held on January 18, 1980, to determine whether the government's failure to turn this testimony over during trial was a violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Thereafter, on August 6, 1980, the District Judge filed his written memorandum denying defendant's post-trial motions.

The District Judge found and ruled, *inter alia:*

> "Throughout the pretrial proceedings in this matter the defense strenuously urged that the prosecution be barred because of the statute of limitations. It was obvious before and during the trial that the date of

the alleged offense was of particular importance to the defense. By his several filings of September 14, 1979, in particular his motion for discovery and inspection, his motion for a bill of particulars, and his motion to dismiss based on the statute of limitations, *the defendant made a specific pretrial request for exculpatory material relating to the date of the alleged offense.*" (App. I, p. 9, *infra;* emphasis supplied.)

* * *

"Because the Court has found that defendant's pretrial motions, taken together, constitute a specific request for exculpatory material relating to the date of the offense,[7] the next issue concerns the materiality of the information requested. 'A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.' *Agurs, supra,* n. 7, 427 U.S. at 104. This is as much as saying that if evidence omitted due to nondisclosure creates, in the context of the entire record, a reasonable doubt that did not otherwise exist, it is material. *See Ibid.* at 112."

"[7] The Government cannot reasonably argue that it did not have 'notice of exactly what the defense desired.' *See United States* v. *Agurs,* 427 U.S. 97, 106 (1976)." (App. I, p. 10, *infra.*)

Applying the "reasonable doubt that did not otherwise exist" standard, the Court concluded that the withheld transcript was not material as "evidence" "because its introduction at trial would not have created a reasonable doubt as to any essential issue" (App. I, p. 10, *infra*), whether it was introduced as impeachment of potential prospective differing trial testimony by Petroff, or as substantive evidence under Rule 801(d)(1)(A) of the Federal Rules of Evidence. (App. I, p. 11, *infra*)

Respecting the defendant's claim that the withheld transcript had an "informational" value, the District Judge concluded "that the defense did obtain, in a pretrial interview, all the substantive information contained in Petroff's grand jury testimony." (App. I, p. 11, *infra*) Thus, even though he considered "the portion of Petroff's grand jury testimony concerning the date of the offense to be *Brady* material" (App. I, p. 13 n. 11, *infra*), the District Judge determined that no violation of due process was occasioned by the nondisclosure. (App. I, p. 13, *infra*)

Finally, the District Judge, although recognizing that the defendant was effectively disabled from calling Petroff as a witness by uncertainty as to what Petroff had told the grand jury, concluded that it would "radically extend the *Brady* doctrine * * * [to require that] the possible effect on the outcome of a trial * * * be assessed not only in terms of the impact withheld information may have on the jury, but also in terms of how a change in trial strategy (and speculation as to what evidentiary variations might then have resulted) might have affected the jury." (App. I, p. 12, *infra*)

The Court of Appeals took a substantially different approach. First, the Court refused to be influenced by the fact that the defendant already possessed, through the pretrial interview, the "information" contained in Petroff's grand jury testimony, because "he did not know what Petroff had said before the grand jury to cause the government not to indict him and to subpoena him as a potential witness at trial." (App. II, p. 20, *infra*) As a result: "The peculiar circumstances of this case suggest that this was an instance in which the government should

have disclosed information to the defendant."[8] (App. II, p. 20, *infra*) Thus, the Court considered this "to be suppression of evidence unknown to the defendant." (App. II, p. 23, *infra*)

Second, the Court of Appeals agreed with the District Judge that the portion of Petroff's grand jury testimony concerning the date of the offense was favorable to the defense in view of the defense theory "that Biggerstaff took an entirely unrelated meeting with defendant in June or July of 1974 and then claimed that the meeting was related to the disposition of the jewelry stolen on August 23." (App. II, pp. 24-5, *infra*)

However, the Court of Appeals ruled that defendant's pretrial request for exculpatory materials was "general." (App. II, pp. 18, 26, *infra*) It distinguished between the pretrial request and the specific request made during trial on the grounds that the latter was not for *Brady* materials: "The mere fact that materials requested by a defendant for other purposes turn out to have some value for *Brady* concerns does not convert the request to one made pursuant to *Brady*." (App. II, p. 26, n.7, *infra*) As a consequence, the Court applied the second standard of materiality and held that the suppressed transcript or Petroff's trial testimony "would not have created a reasonable doubt that did not otherwise exist." (App. II, p. 27, *infra*)

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[8] One such circumstance was the potential applicability of Rule 801(d)(1) of the Federal Rules of Evidence. That Rule, as noted by the Court of Appeals, would have permitted the government both to impeach defense witness Petroff and introduce the impeaching evidence as substantive evidence of the offense, if Petroff's trial testimony varied from his grand jury testimony. (App. II, p. 20, *infra*) In contrast to the District Judge, the Court of Appeals recognized that defense strategy considerations are "almost always * * * affected when exculpatory materials are suppressed." (App. II, p. 22, n.4, *infra*)

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in this case is wholly at odds with the spirit of *Brady* v. *Maryland*, 373 U.S. 83 (1963) and *United States* v. *Agurs*, 427 U.S. 97 (1976), as interpreted by the courts of appeal in other circuits (compare *United States ex rel. Marzeno* v. *Gengler*, 574 F.2d 730, 736 (3 Cir. 1978) with *United States* v. *Goldberg*, 582 F.2d 483, 489-90 (9 Cir. 1978)), neglects the explicit finding of the District Judge that Petitioner had made a "specific request of exculpatory material relating to the date of the offense * * *" (R. 56; App. I, p. 9, *infra*), and places a greater emphasis on the form of a request than its substance.

All must agree that *Agurs'* specific request requirement is premised on a principle of fairness: A specific request "serves the valuable office of flagging the importance of the evidence for the defense and thus imposes on the prosecutor a duty to make a careful check of his files." *United States* v. *Keogh*, 391 F.2d 138, 147 (2 Cir. 1968). The emphasis clearly is on the desirability of giving the prosecutor notice of exactly what it is that the defense desires. *United States* v. *Agurs*, 427 U.S. at 106. See also, *Chavis* v. *North Carolina*, 637 F.2d 213, 224 (4 Cir. 1980).

The District Judge unquestionably felt that the defendant had made a specific—as distinquished from general—request. Citing *Agurs*, he succinctly noted: "The Government cannot reasonably argue that it did not have 'notice of exactly what the defense desired.'" (App. I, p. 10 n.7, *infra*.) He went further, however. He unequivocally found as fact:

> "* * * It was obvious before and during the trial that the date of the alleged offense was of particular importance to the defense. By his several filings of September 14, 1979, in particular his motion for discovery and inspection, his motion for a bill of particulars, and his motion to dismiss based on the statute of limitations, *the defendant made a spesific pretrial request for exculpatory material relating to the date of the alleged offense.*" (App. I, p. 9, *infra;* emphasis supplied.)

Nor had the government ever claimed lack of notice as to what the defendant wanted; it merely claimed that the defendant did not assert "grounds" to support his request that Petroff's grand jury testimony be produced, or use the rubric that the testimony was "exculpatory." (R. 51, pp. 1-2, n.1.)

No case has suggested that the prosecutor must be advised of the reasons the defense wants the requested material; it is, or should be, sufficient for the prosecutor to know what the defense wants, as distinguished from how it intends to use it. See, e.g., *Ostrer* v. *United States*, 577 F.2d 782, 786-7 (2 Cir. 1978). Thus, the Court in *Agurs* noted that a specific request is one similar to the request made in *Brady* itself—a request for the statement of a named person (*Brady* v. *Maryland*, 373 U.S. 83, 84 (1963))[9]—one that gives the prosecutor "notice of exactly what the defense disere[s]." 427 U.S. at 106.

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[9] See also, *United States* v. *Mackey*, 571 F.2d 376, 389 (2 Cir. 1978): "At a minimum, we would require that the defendant focus his request on a particular witness before we would hold the request to be 'specific'." Interestingly, the Court in *Mackey* plainly noted that, by failing to identify the particular witness, defendant's request did not give the prosecutor notice of what was wanted. 571 F.2d at 389.

The Court of Appeals did not honor this finding, however. Even though the "peculiar circumstances of this case suggest that this was an instance in which the government should have disclosed information to the defendant," (App. II, p. 20. *infra*), the Court ruled, in effect, that the government could be forgiven its not doing so, not because it did not know what the defendant wanted, and why, but because the defendant did not explicitly state how he intended to use the requested material.

Whether *Brady* and *Agurs*, with their clear due process underpinnings, are to be so circumscribed is crucially important to the administration of criminal justice in the District Courts. The "cat and mouse" game which took place during the trial of this case, and before, should never have occurred. If, as the Seventh Circuit suggests, it is encumbent upon a defendant to state specific grounds why he is requesting specific materials, where the grounds have already been flagged in pretrial submissions, then this Court should, we respectfully submit, speak to the subject so that the bench and bar will be alerted to the need for greater specificity. If, on the other hand, the specificity recognized by the District Judge in this case is sufficient, then government counsel should be so advised to avoid the delays necessarily caused by their withholding evidence and materials that all agree should have been produced in the first instance.

Some Courts of Appeal have impliedly suggested that the latter is the desirable point of view. *Cf., United States ex rel., Marzeno* v. *Gengler*, 574 F.2d 730, 736 (3 Cir. 1978); *United States v. Goldberg*, 582 F.2d 483, 488-90 (9 Cir. 1978); *Chavis* v. *North Carolina*, 637 F.2d 213, 224 (4 Cir. 1980).

CONCLUSION

For the above and foregoing reasons, we respectfully submit that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review the judgment in this case.

Respectfully submitted,

HARRY J. BUSCH
SHERMAN C. MAGIDSON
Attorneys for Petitioner

APPENDIX

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

UNITED STATES OF AMERICA,

vs.

GINO MARTIN

H CR 79-20

ORDER

On October 25, 1979 the defendant moved alternatively for entry of a judgment of acquittal, arrest of judgment, or a new trial. On November 28, 1979 the Government filed a response to the defendant's motions. Excerpts from the grand jury transcripts in this case were attached to the response. At the Court's request, the Government supplemented its response on December 4, 1979 with a memorandum and a complete set of grand jury transcripts relating to this case.

On December 5, 1979 the Court noted that in addition to any issues raised by defendant's earlier post trial motions, certain testimony before the grand jury that was not disclosed to the defendant before or during trial raised a question of due process under *Brady* v. *Maryland*, 373 U.S. 83 (1963). This issue was briefed and an evidentiary hearing was held on January 18, 1980. The defendant on January 28, 1980 filed a supplemental memorandum, and later, by letter, drew the Court's attention to additional

authority. Finally, pursuant to Court request, the defendant on February 25, 1980 submitted a copy of the transcript of a pre-trial interview, conducted by the defendant's counsel, of George Petroff.

Initially, it is ORDERED that the letter received from defendant's counsel on January 30, 1980 and the transcript received on February 25, 1980 both be filed and made a part of the record of this case. It is FURTHER ORDERED that the transcript of the Petroff interview be marked Defendant's Exhibit C, and that it be SEALED.

It should be noted at this point that one of the grounds put forward in defendant's call for entry of judgment of acquittal or arrest of judgment is an inappropriate basis for these motions, brought pursuant to Rules 29(c) and 34 of the Federal Rules of Criminal Procedure. The defendant argued, especially in his December 26, 1979 memorandum and at the January 18, 1980 hearing, that because of the applicable statute of limitations the indictment here was insufficient, and the prosecution improper, in light of certain testimony the grand jury heard regarding the date of the offense charged. As is more fully developed in parts I and II, *infra*, the tests to apply in ruling 29(c) and Rule 34 motions do not accommodate consideration of grand jury testimony.[1] However, the Court will treat this argument as a renewed Rule 12(b) motion to dismiss the indictment, and will consider it at this time because the pertinent grand jury transcripts were not available to the defendants before the trial. *See* Fed. R. Crim. P. 12(f); *United States* v. *Cathey*, 591 F.2d 268, 271 (5th Cir. 1979).

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[1] Clearly a new trial could not affect the sufficiency or propriety of the indictment, so defendant's rule 33 motion does not purport to rest on the statute of limitations argument.

I. The Rule 29(c) Motion.

The test to be applied in ruling on a post-verdict motion for judgment of acquittal is

> whether at the time of the motion there was relevant evidence from which the jury could reasonably find [the defendant] guilty beyond a reasonable doubt, viewing the evidence in the light most favorable to the Government . . . bear[ing] in mind that "it is the exclusive function of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences."

United States v. *Beck*, 615 F.2d 441, 448 (7th Cir. 1980) (quoting *United States* v. *Rojas*, 554 F.2d 938, 943 (9th Cir. 1977)). An equivalent formulation of this test requires entry of judgment of acquittal when "the jury might reasonably conclude that the evidence is inconsistent with the hypothesis of the defendant's innocence," or when "the evidence, viewed in the light most favorable to the government, is so scant that the jury could only speculate as to the defendant's guilt . . . such that a reasonably minded jury *must* have a reasonable doubt as to the defendant's guilt." *Ibid.* (citations omitted).[2]

Here, there was ample credible testimony that could reasonably support a guilty verdict. Therefore, the defendant's motion for a post-verdict judgment of acquittal is DENIED.

II. The Rule 34 Motion.

Under Rule 34 of the Federal Rules of Criminal Procedure, judgment may be arrested only if the indictment

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[2] From these tests it is clear that a Rule 29(c) motion for entry of judgment of acquittal attacks the sufficiency of the evidence adduced at trial, not the sufficiency or propriety of the indictment. The grand jury testimony is irrelevant to this consideration.

does not charge an offense or if the court is without jurisdiction of the offense charged. Here, the Court plainly has jurisdiction of the offense charged, a violation of 18 U.S.C. §2315 occurring within the Northern District of Indiana. *See* 18 U.S.C. §3231. In addition, the indictment in this case is facially valid and adequately charges a violation of 18 U.S.C. §2315.[3] Thus the defendant is entitled to no relief under Rule 34,[4] and this portion of his motion is DENIED.

III. The Renewed Rule 12(b) Motion.

In its Order of October 16, 1979 the Court discussed at some length the validity of the indictment and the propriety of the prosecution here in light of the statute of limitations. The only new factor justifying any reconsideration of this issue is the availability of transcripts of the testimony heard by the grand jury. This factor is irrelevant to the first argument dealt with in the October 16th Order, that based on *United States* v. *Gammill*, 421 F.2d 185 (10th Cir. 1970).

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[3] See pages 6-7 of the October 16, 1979 Order of this Court in this case.

[4] As indicated earlier, the defendant calls for arrest of judgment urging that the indictment is insufficient and the prosecution improper in light of certain grand jury testimony. However, in ruling on a Rule 34 motion the Court may look only at the face of the "record," which for this purpose includes only the indictment, the plea, the verdict, and the sentence. *United States* v. *Sisson*, 399 U.S. 267, 281 and n. 10, 282 (1970). Here the indictment is facially valid, adequately charging a punishable offense. A challenge to the indictment based on grand jury transcripts is inappropriate under Rule 34 because such items are outside the Court's purview for purposes of that Rule.

The second argument addressed in the October 16th Order, restated in light of the grand jury testimony, rests on the following: (a) the indictment is less than exact as to the date of the offense, (b) it is possible to read the indictment to place the offense either inside or outside the statutory limitations period, and (c) the grand jury heard testimony that tended to place the offense at one of two times, one inside and one outside the limitations periods. Thus, it is urged, the Court cannot conclude with certainty that the defendant was indicted for the same offense occurring within the limitations period, for which he was tried. The defendant asserts that this speculative possibility that he was indicted for acts outside the limitations period renders his trial for acts within the period constitutionally infirm as a denial of the defendant's Fifth Amendment right not to be held to answer for an offense of this gravity until first indicted by a grand jury for that offense.

The defendant specifically argues that the vagueness of the date reference in the indictment, "in or about August, 1974," undercuts the sufficiency of the indictment because the language "in or about August 1974" may have reflected a compromise between testimony placing the offense in late August 1974 and testimony indicating that it might have occurred in July 1974.[5] However, the sufficiency

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[5] The grand jury testimony of Federal Bureau of Investigation Special Agent Scigalski, without literally indicating a calendar date on which the offense transpired, clearly placed it a few days after August 23, 1974. James Corbett testified that the offense occurred on August 27 or 28, 1974, and Mae Biggerstaff's testimony indicated that the offense took place between August 25 and 29, 1974. George Petroff testified that events constituting the offense occurred "about July" of 1974, but he made clear that he was not at all positive of this.

of an indictment is not judged from a comparison of its language to the evidence heard by the grand jury. Indeed, this Court considers itself foreclosed from such an inquiry by *Costello* v. *United States*, 556 U.S. 359 (1956). *See also United States* v. *Fried*, 576 F.2d 787 (9th Cir.), *cert. denied*, 99 S.Ct. 255 (1978); *United States* v. *Brown*, 574 F.2d 1274 (5th Cir.), *reh. denied*, 578 F.2d 871, *cert. denied*, 99 S.Ct. 720 (1978) (at 1277 stating: " 'We will not review the sufficiency of the evidence, *if any*, supporting the grand jury indictments in this case.' " quoting *United States* v. *Cruz*, 478 F.2d 408, 412 (5th Cir. 1973)) (emphasis added). The sufficiency of an indictment is determined by consideration of certain factors discussed in this Court's October 16, 1979 Order. There the indictment was found facially sufficient and valid. That determination is affirmed here.

The defendant's Grand Jury Clause argument, therefore, properly raises only the direct question whether the defendant was indicted for the same late August 1974 actions for which he was convicted. Without weighing the evidence heard by the grand jury or "second guessing" what was in the minds of those grand jurors voting to return a true bill, the Court concludes that because the indictment was sufficiently precise as to date, and because the proof at trial was of an offense committed squarely within the time period mentioned in the indictment, the defendant's Grand Jury Clause rights were not violated. The Court will not go behind the face of a valid indictment absent a showing of bias, abuse or other defect in the grand jury procedure.

The third argument addressed in this Court's October 16th Order was based on the defendant's right to the protection of the statute of limitations applicable here, and the assertion that this right was denied without due pro-

cess of law when the grand jury purportedly indicted the defendant for acts outside the limitations period. Again, the only new factor is the availability of the grand jury records.

These records add little to the defendant's argument, which hinges on the speculative possibility that the grand jury was thinking of an offense occurring prior to August 15, 1974 when it indicted the defendant for actions "in or about August, 1974." The defendant originally argued only that the vagueness of "in or about August, 1974" raised the possibility that the indictment was based on pre-August 15, 1974 actions. The fact that the grand jury heard one bit of testimony, uncertainly indicating that the offense might have occurred in July 1974, does not significantly reduce the speculative nature of the defendant's point. If the grand jury had heard only of pre-August 15, 1974 actions, the Court would be presented with a harder problem. But here, because the grand jury heard evidence of an offense committed after August 14, 1974, the Court does not consider the presumptions attached to grand jury proceedings to have been rebutted. The defendant's renewed Rule 12(b) motion is DENIED.

IV. The Brady Issue.

A. Findings of Fact

The *Brady* issue arises from the following facts, which the Court now finds on the basis of the complete record of this case, particularly evidence developed at the January 18, 1980 hearing.

George Petroff testified before the grand jury on August 14, 1979. To the extent that he appeared to have any direct knowledge of a certain meeting between the defendant and Richard Biggerstaff, at which meeting the offense allegedly occurred, Petroff was not at all certain of the

date of that meeting. However, he agreed that it had been in 1974, and stated that the time of year had been "about July." All the other grand jury witnesses who testified, directly or indirectly, as to the date of this meeting placed it within a few days after August 23, 1974. The Government's proof at trial focused exclusively on a meeting occurring in this short period following August 23, 1974.

About one week prior to defendant's trial, defendant's counsel, Mr. Marcus, interviewed Mr. Petroff. A stenographic recording was made of this interview (Defendant's Exhibit C). In virtually every material detail Mr. Petroff's answers to Mr. Marcus' questions were substantially identical to his testimony, in response to similar questions, before the grand jury. The only noteworthy difference, with respect to a material point, between Mr. Petroff's grand jury testimony and his pretrial statement to Mr. Marcus was his inclusion of June 1974 in his uncertain recollection of the time frame during which the pivotal meeting between the defendant and Richard Biggerstaff may have occurred. *Compare* Defendant's Exhibit C, page 7, lines 3-8, *with* Grand Jury Report of Proceedings, August 14, 1979 (Defendant's Exhibit B), page 16, lines 3-8.[6]

Mr. Petroff was subpoenaed to appear at the trial by both the Government and the defendant. Both sides were aware of this before the trial.

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[6] At the January 18, 1980 hearing Mr. Petroff testified, to the best of his knowledge, that the meeting occurred in July or August 1974, and that he had told Mr. Marcus this at the pretrial interview. Mr. Marcus then testified that Mr. Petroff had placed the meeting in July, and that he might have mentioned August. *See* Transcript of Hearing, January 18, 1980, pages 48-49, 67-68. In light of this uncertainty, *see also Ibid.* at page 7, lines 5-6, 11-12, the Court does not find that Mr. Petroff mentioned the August date, even though Defendant's Exhibit C is not a record of *every* conversation between Mr. Marcus and Mr. Petroff. *See Ibid.* at page 74.

About midway through the trial, shortly before the Government rested, the Government informed Mr. Marcus that it was not going to call Mr. Petroff as a witness. A short time later, during a conference in the Court's chambers, Mr. Marcus stated to the Court his understanding that the Government would not call Mr. Petroff, and requested that the Government turn over Mr. Petroff's grand jury testimony. No specific grounds for this request were put forward. The Government refused, pointing out that the defense had subpoenaed Mr. Petroff. Mr. Marcus expressed his intention to call Mr. Petroff. The Court then indicated that it would require the Government to give the defense Mr. Petroff's grand jury testimony after direct examination of Mr. Petroff by the defense.

The defense never called Mr. Petroff as a witness at the trial.

At no time before or during the trial did the Government give the defense Mr. Petroff's grand jury testimony.

Throughout the pretrial proceedings in this matter the defense strenuously urged that the prosecution be barred because of the statute of limitations. It was obvious before and during the trial that the date of the alleged offense was of particular importance to the defense. By his several filings of September 14, 1979, in particular his motion for discovery and inspection, his motion for a bill of particulars, and his motion to dismiss based on the statute of limitations, the defendant made a specific pretrial request for exculpatory material relating to the date of the alleged offense.

B. Conclusions of Law

The defense has not charged the Government with bad faith or prosecutorial misconduct. Nor can the Court discern from the record facts which would support such a charge.

Because the Court has found that defendant's pretrial motions, taken together, constitute a specific request for exculpatory material relating to the date of the offense,[7] the next issue concerns the materiality of the information requested. "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Agurs, supra,* n. 7, 427 U.S. at 104.[8] This is as much as saying that if evidence omitted due to nondisclosure creates, in the context of the entire record, a reasonable doubt that did not otherwise exist, it is material. *See Ibid.* at 112.

Here, the peculiar nature of the "information," *Ibid.* at 103, or "evidence," *Ibid.* at 104, withheld leads to two different analyses.

If the nondisclosed grand jury transcript is treated as evidence, it is not material because its introduction at trial would not have created a reasonable doubt as to any essential issue. The defense admits that the transcript itself would have been admissible as substantive evidence only under Rule 801(d)(1)(A) of the Federal Rules of Evidence.[9] *Thus* whether it was brought in for impeachment or as substantive evidence, the value of the tran-

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[7] The Government cannot reasonably argue that it did not have "notice of exactly what the defense desired." See *United States v. Agurs,* 427 U.S. 97, 106 (1976).

[8] *See also Brady, supra,* 373 U.S. at 87-88: "A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant."

[9] Because information contained in Mr. Petroff's grand jury testimony would already be in evidence before Rule 801(d)(1)(B) would come into play, this route of introduction is irrelevant here.

script would be practically restricted to a weak[10] rebuttal or impeachment of Petroff's actual trial testimony that differed from his grand jury statements. Because of the doubtful impact such offsetting pieces of "evidence" would have, especially in light of other firm, credible evidence concerning the offense, the Court concludes that the grand jury transcript, as "evidence" would not have affected the outcome of the trial.

If the Court treats Petroff's grand jury testimony as "information," other factors are brought into play. Initially, it is noteworthy that the defense did obtain, in a pretrial interview, all the substantive information contained in Petroff's grand jury testimony. Thus in a literal sense this situation does not involve "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *Agurs, supra*, 427 U.S. at 103.

However, the defendant argues that because he did not see Petroff's grand jury testimony, he could not be sure just what that testimony was, in spite of Petroff's statements to Mr. Marcus. Thus the only indisputable "infor-

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[10] The most pertinent grand jury testimony, after all, is that Mr. Petroff really didn't remember very well when the meeting occurred, but, thought it might have been July 1974. This would hardly rebut or impeach a firm statement that the meeting occurred some other month. Furthermore, if Mr. Petroff's trial testimony were as uncertain as his grand jury testimony was, neither could be given enough weight to affect the outcome of the trial in light of countervailing evidence of a late August date.

It should be noted that the Court considers Petroff's grand jury testimony as to date to be the only one of his grand jury statements that goes directly enough to the issue of guilt to merit close scrutiny. Other differences between his story and those told by Government witnesses, even taken together, do not significantly rebut or impeach those other witnesses with respect to essential issues of fact.

mation" as to Petroff's actual testimony before the grand jury was unavailable to the defendant. This, it is urged, effectively disabled the defendant from calling Petroff as a witness because he could not know, before calling Petroff, precisely what impeachment value lay in the grand jury testimony. The defendant's uncertainty was heightened by the presumption, after *Brady*, that anything exculpatory in the grand jury records would already have been disclosed.

The Court recognizes the tactical problem faced by the defense in this situation. However, the fact of the matter is that the Government withheld only Petroff's grand jury testimony, not his potential trial testimony. Defendant's argument would radically extend the *Brady* doctrine by requiring the possible effect on the outcome of a trial to be assessed not only in terms of the direct impact withheld information may have had on the jury, but also in terms of how a change in trial strategy (and speculation as to what evidentiary variations might then have resulted) might have affected the jury. In this Court's opinion such an extension is unwarranted, and would reflect a capitulation to the " 'sporting theory of justice' which the [Supreme] Court expressly rejected in Brady." *Agurs, supra*, 427 U.S. at 108 and n. 15.

Here, the defense knew, at least as well as the prosecution did, what Petroff was likely to say on the stand. The defense also knew that after direct examination of Petroff his grand jury testimony would be turned over. Because nothing from Petroff's grand jury testimony had been disclosed pursuant to *Brady*, there was a perceived risk, despite Petroff's indication to Mr. Marcus that he had given him the same story he had told the grand jury, that Petroff's grand jury testimony had in fact been different,

and was harmful to the defense. Defense counsel then made a tactical choice not to call Petroff in order to elicit relatively weak evidence to the effect that the offense might have occurred in July 1974—to the best of Petroff's recollection. The admitted concern was that Government impeachment would do more harm than Petroff's uncertain testimony would do good, leaving a net of zero in added effective evidence. While the presumptions flowing from *Brady* understandably added to the risk factor, the Court cannot find a fundamental unfairness in this situation justifying a new trial on due process grounds.

Finally, even if the Court determines that Petroff's grand jury testimony was *Brady* material in the sense that portions of it contained exculpatory information that should have been disclosed prior to trial,[11] the fact that defense counsel already knew the essential contents of that testimony from another source, Petroff himself, brings this case within the rationale of *United States* v. *Weidman*, 572 F.2d 1199, 1206 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978), and *United States* v. *Craig*, 573 F.2d 455, 492 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978). Thus there was no denial of due process caused by the nondisclosure.

As the defendant points out, *Weidman* is distinguishable in the sense that there the nondisclosed material could have been subpoenaed or otherwise obtained from a neutral source. However, this argument depends on the characterization of the nondisclosed material in terms of its form,

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[11] The Court need not actually make this determination because, as the rest of the paragraph shows, nondisclosure of this testimony did not result in a denial of due process. However, the Court does consider the portion of Petroff's grand jury testimony concerning the date of the offense to be *Brady* material. Prosecutors tread on very thin ice when they presume that witnesses will always tell the same story in a private interview that they told to a grand jury.

a grand jury transcript. As discussed above, the only occasions for using such a transcript at trial would have arisen in contexts where the impact of the transcript, in light of the record as a whole, would have been negligible. Thus, if the undisclosed material here was, as defendant argues, unavailable, it was also not material in a constitutional sense.

For the reasons discussed above, it is ORDERED that defendant's motions for a judgment of acquittal, arrest of judgment, and for a new trial be, and hereby are, DENIED.

Enter: August 6, 1980.

/s/ Phil M. McNagny, Jr.
Judge, United States District Court

APPENDIX II

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued February 26, 1981)
June 10, 1981.
Before
Hon Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Abraham Lincoln Marovitz, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-2469 vs.

GINO MARTIN, a/k/a "Blacky,"

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 79-CR-20
Phil M. McNagny, Jr., *Judge.*

ORDER

After a trial in the United States District Court for the Northern District of Indiana, defendant-appellant, Gino "Blacky" Martin, was convicted of one count of receiving

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* The Honorable Abraham Lincoln Marovitz, Senior District Judge of the Northern District of Illinois, is sitting by designation.

stolen goods in violation of 18 U.S.C. § 2315.[1] The district court sentenced defendant to five years imprisonment. From that conviction, and the district court's denial of his post-trial motions, defendant now appeals, presenting two issues: (1) Did the government's failure to disclose certain grand jury testimony violate defendant's right to a fair trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963)? (2) Were the stolen goods in question moving in interstate commerce when defendant received them, as required by 18 U.S.C. § 2315? We affirm.

I.

On August 23, 1974, Richard Biggerstaff, James Corbett, and two other men robbed a home in Evansville, Indiana. Following the robbery Biggerstaff took jewelry obtained in the theft to Corbett's home in Henderson, Kentucky, where other stolen jewelry was also being kept. The record is somewhat confused as to who transported the jewelry thereafter. Nonetheless, on August 14 the jewelry stolen in Evansville was taken back to Indiana for attempted sale. When the attempt failed, it was returned to Kentucky. On August 25 either Corbett or Biggerstaff took the jewels to Biggerstaff's home in Hobart, Indiana, a town near the city of Gary. On the following day Biggerstaff asked Jack Berbesque to contact defendant so that Biggerstaff might sell the jewelry to him.

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[1] The relevant portion of 18 U.S.C. § 2315 reads:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, . . . moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

On August 30, four days later, Biggerstaff had heard nothing from Berbesque. He therefore traveled to a clothing store in Gary, over which Berbesque lived. Meeting George Petroff, the manager of the store, Biggerstaff asked him to contact defendant. Later that same evening, according to Biggerstaff, Petroff led Biggerstaff and Corbett upstairs from the clothing store to meet with defendant. Defendant purchased, along with other jewelry, two diamonds stolen in the August 23 robbery. Petroff received some of the stolen jewelry in return for his help and delivered defendant's payment to Biggerstaff the next day, August 31.

Biggerstaff was arrested for the Evansville robbery on September 29, 1974. Following his conviction in 1975, he contacted an FBI agent and offered the government information about several crimes in which he had participated or about which he had some knowledge. He told government agents in 1978 that he had sold the Evansville diamonds to defendant, which led to a grand jury investigation and defendant's subsequent indictment, trial, and conviction.

II.

George Petroff testified before the grand jury on August 14, 1979. Prior to trial, defense counsel interviewed Petroff. Both defendant and the government subpoenaed Petroff to appear at trial. Shortly before the government rested, it informed defense counsel that it was not going to call Petroff as a witness. Defendant then requested that the government turn over Petroff's grand jury testimony. The government refused to do so. The district court denied defendant's motion for production of the testimony, but ruled that if defendant called Petroff as a witness, it would require the government to turn over Petroff's grand jury testimony to defendant after Petroff's direct examination.

The defense never called Petroff, and his grand jury testimony was never given to defendant, either before or during trial.

Defendant argues that the government's failure to make a copy of Petroff's testimony before the grand jury available to him violated his right to a fair trial under *Brady* v. *Maryland*, 373 U.S. 83 (1963). The *Brady* case established the prosecution's constitutional obligation to disclose evidence in its possession upon request if that evidence would be material either to defendant's guilt or punishment. It requires that the defendant in a criminal prosecution receive a new trial if two conditions are met. First, the prosecution must have suppressed evidence unknown and favorable to the defendant. Second, the suppressed evidence must be material to guilt or punishment. *Id.* at 87. *See Moore* v. *Illinois*, 408 U.S. 786, 794-95 (1972).

A.

There is no dispute that the government declined to make Petroff's grand jury testimony available to defendant either upon his general request for any exculpatory materials in the government's possession or upon his motions for production of the grand jury testimony both before and during trial. A *Brady* violation will exist, therefore, if the grand jury testimony can be considered unknown and favorable to defendant, and material to his defense.

The government contends that Petroff's testimony was known to the defense because defendant had obtained full knowledge of the substance of the testimony through his extensive pretrial interview with Petroff. The testimony produced by this interview, as Petroff himself testified at a post-trial hearing on defendant's motion for a new trial,

was nearly identical to his grand jury testimony. The government urges that on these facts the evidence requested could hardly be considered unknown to defendant, that it was therefore under no duty to disclose the evidence, and that nondisclosure did not deny defendant a fair trial or prejudice his defense. In support of these contentions the government cites a line of cases in which it has been held that the government is not required to furnish information to the defendant which the latter already possesses or is able to obtain independently. *See United States* v. *Shelton*, 588 F.2d 1242, 1247-50 (1978); *United States* v. *Craig*, 573 F.2d 455, 491-92 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978); *United States* v. *Weidman*, 572 F.2d 1199, 1206 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978); *United States* v. *DiGiovanni*, 544 F.2d 642, 645 (2d Cir. 1976); *United States* v. *Stewart*, 513 F.2d 957, 960 (2d Cir. 1975); *United States* v. *Ruggiero*, 472 F.2d 599, 603-05 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

Were it not for the presence of an additional factor in this case, we would be persuaded by the government's argument. Here, both the government and defendant listed Petroff as a potential witness at trial. Defense counsel had interviewed Petroff prior to trial and considered his testimony exculpatory. Yet when defendant made a request for exculpatory material, the government did not disclose Petroff's grand jury testimony and continued to list him as a possible witness, thereby giving at least the impression that he had made *in*culpatory statements before the grand jury. During trial, evidence showed that Petroff could have been indicted as an aider and abettor in the offense charged and quite possibly as a co-conspirator. Notwithstanding this evidence, Petroff had not been indicted and had been subpoenaed as a government witness.

Defendant knew the substance of what Petroff would testify to at trial if called as a defense witness; he did not know what Petroff had said before the grand jury to cause the government not to indict him and to subpoena him as a potential witness at trial.

In *United States* v. *Agurs* the Supreme Court stated that there is a significant practical difference between the prosecutor's pretrial decision not to release certain information in his files and the judge's post-trial decision whether nondisclosure deprived the defendant of his due process right to a fair trial. 427 U.S. 97-107-08 (1976). "Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* at 108.

The peculiar circumstances of this case suggest that this was an instance in which the government should have disclosed information to the defendant. Defendant believed he was faced with a dilemma he must resolve by foregoing use of Petroff's testimony at trial. For if Petroff's testimony at trial had contradicted evidence given under oath during his grand jury examination, under Federal Rule of Evidence 801(d)(1)[2] the grand jury testimony could have been admitted into evidence not only to impeach Petroff's trial testimony but also as substantive evidence of the offense

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[2] Under this rule a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. . . .

charged.[3] On balance, defendant decided he could not af-

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[3] None of the cases the government cites in support of its argument that it need not turn over to defendant evidence which is already known to him involved the situation in which both sides have called the same person as a potential witness and that person's prior statements would, because made under oath, be admissible at trial both for impeachment purposes and as substantive evidence of the charged offense. In *Weidman* the information in question involved immunity discussions with a government witness and a file showing an alleged attempt by a government witness to bribe an NLRB official. The court dismissed both *Brady* claims because, first, the terms of the immunity agreement were fully disclosed to the defendant and defense counsel cross-examined the witness on the point at trial; and second, the prosecution was unaware of the bribery attempt, the file was not in its hands, and defendant was aware of the attempt, cross-examined the witness on it, and could have subpoenaed the file. 572 F.2d at 1206. In *Shelton* the alleged *Brady* materials involved included the grand jury testimony of two witnesses who testified for the defense, an interview of a bookkeeper by the IRS, and 1900 pages of other materials. The court held that a new trial was not required for three reasons: the grand jury testimony and the 1900 pages of materials were merely cumulative and did not prejudice a defendant, the bookkeeper's statement was not found after a good-faith attempt by the government to locate it, and the defendant lacked sufficient diligence in his efforts to obtain the evidence independently since the witness was available to the defense to be interviewed. 588 F.2d at 1247-48.

At issue in *Craig* were the memoranda made by postal inspectors of interviews with nine state senators and their grand jury testimony. Defendant claimed that this information would have aided his cross-examination of another witness and his decision whether to call declarants as witnesses. The court held that the prosecution need not have disclosed this information because of the defendant's pre-trial knowledge of the substance of the statements, his opportunity to interview the senators as potential witnesses, and the district court's offer to subpoena them and conduct a hearing outside the presence of the jury to ascertain the information sought. 573 F.2d

(footnote continued)

ford to take the risk that these circumstances led him to believe was involved in calling Petroff as a defense witness.[4]

(footnote continued)
at 491-92. The alleged *Brady* material in *DiGiovanni* was evidence regarding the voluntariness of the consent given by the occupant of an apartment to a search of that apartment. The court held that the government was not required to turn over this information to defendant because defendant was on the scene at the time of the search and therefore was fully aware of any exculpatory testimony the witness might have furnished as a witness for the defense. 544 F.2d at 645.

In *Stewart* the information in question was a statement given to the FBI by a person not called as a witness at trial. The court dismissed the *Brady* argument, stating that defendant could have interviewed the potential witness prior to trial and then called him at trial. 513 F.2d at 960. The alleged *Brady* material in *Ruggiero* was the grand jury testimony of persons who were called by neither side and did not testify at trial. The disclosure of this information was not required, the court held, because the defendant had strong reason to believe that the testimony would have been helpful to him and so argued at trial, yet he did not subpoena the witnesses to testify or advise the court of any inability to elicit their testimony. 472 F.2d at 604-05.

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[4] Although it found nothing fundamentally unfair in the situation, the district court recognized the tactical problem with which defendant was presented: "[b]ecause nothing from Petroff's grand jury testimony had been disclosed pursuant to *Brady*, there was a perceived risk, despite Petroff's indication to [defense counsel] that he had given him the same story he had told to the grand jury, that Petroff's grand jury testimony had in fact been different, and was harmful to the defense." On facts very similar to these, the Sixth Circuit recently affirmed a district court decision holding that the tactical problems for the defense are aggravated rather than mitigated when a witness has been interviewed and is apparently willing to give evidence favorable to defendant at trial and the prosecution

(footnote continued)

The government could hardly have been hurt by releasing the requested information. Such release would have resolved defendant's dilemma and avoided appeal on this issue. As the district court noted, prosecutors tread on very thin ice when they assume that witnesses will never tell different stories in grand jury investigations and in private interviews. Although Petroff's interview statements proved to be virtually identical to his grand jury testimony, prospectively defendant could not be entirely sure that they would be identical until he was allowed to examine the grand jury testimony. We consider this to be suppression of evidence unknown to the defendant.

(footnote continued)

fails to disclose his prior statements upon request and at the same time lists him as a potential prosecution witness. *Jones* v. *Jago*, 428 F.Supp. 405 (N.D. Ohio 1977), *aff'd*, 575 F.2d 1164 (6th Cir.), *cert. denied*, 439 U.S. 883 (1978). As the *Jones* court noted, although the witness was never called by the prosecution at trial, "the risk that he had incriminated [the defendant] in his statement to the police thus appeared to the defense counsel to be too great to allow him to take the stand." *Id.* at 410. By refusing to make the witness's statements available to defendant, the government "not only denied the defense the use of the statement itself but effectively prevented the defense" from eliciting the witness's favorable testimony in court. *Id.*

The district court in this case, however, refused to apply *Jones*, stating that a decision similar to that of *Jones* "would radically extend the *Brady* doctrine by requiring the possible effect on the outcome of a trial to be assessed not only in terms of the direct impact withheld information may have had on the jury, but also in terms of how a change in trial strategy (and speculation as to what evidentiary variations might then have resulted) might have affected the jury." But defense strategy almost always is affected when exculpatory materials are suppressed. Under *Agurs* the judge will take this into consideration when assessing the error in light of the entire record.

Suppression of evidence unknown to defendant, however, is not enough under *Brady*. The evidence in question must also be shown to be favorable to the defendant before a *Brady* violation exists. Defendant contends that the transcript of Petroff's grand jury testimony contains important exculpatory evidence because it differs from the testimony of other witnesses in several respects, but in particular because it shows that the meeting between defendant and Biggerstaff occurred *prior* to the robbery on August 23, that Corbett was not present at the meeting, that there was no mention of stolen jewelry, and that there was neither payment by Biggerstaff to Petroff nor subsequent payment by Petroff to Biggerstaff.[5] Defendant argues that Petroff's grand jury testimony would have been extremely valuable to his defense because it revealed for the first time that there was only one meeting between Biggerstaff and defendant in which Petroff played a part and indicated that defendant had not been involved in receiving stolen goods on August 30. Instead, defendant urges, Petroff's testimony would have revealed that Biggerstaff took an entirely unrelated meeting with defendant in June

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[5] The transcript of Petroff's grand jury testimony contains the following evidence: In response to a question as to when the meeting between defendant and Biggerstaff took place, Petroff answered, "I really don't remember the date . . . I don't know the exact date." Pressed for an answer, Petroff replied, "I'd say, about July. But I'm not positive of the fact." When asked if anyone else was at the meeting, Petroff answered, "Not that I remember, no. . . . There might have been [someone else with Biggerstaff], but I don't remember anyone being with him." Petroff also testified that he never received any money or jewelry from Biggerstaff for being the middleman in the transaction.

or July of 1974 and then claimed that the meeting was related to the disposition of the jewelry stolen on August 23.[6]

The government contends that Petroff's uncertainty as to the date of the meeting between Biggerstaff and defendant and whether another person was present at that meeting negates any possible exculpatory effect Petroff's grand jury testimony might possess. The district court disagreed with the government, finding the portion of Petroff's testimony concerning the date of the offense to be *Brady* material. Although it may be a close case, we agree with the district court that Petroff's testimony could be construed as favorable to the defendant. In the future prosecutors should turn over to defendants any such conceivably unknown and favorable materials upon request.

B.

Even if favorable and unknown evidence is suppressed by the prosecution, however, the inquiry is not at an end. The suppressed evidence still must meet some standard of materiality in order to justify a new trial. *Brady* itself did not spell out the criteria to be used in determining the requisite degree of materiality. It was not until thirteen years after *Brady* that the Supreme Court set down standards to help ascertain whether there has been suppression of evidence material to a defendant's defense. *See United States* v. *Agurs*, 427 U.S. 97 (1976). The

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[6] Defendant suggests Biggerstaff may have wrongfully implicated defendant in the crime because as a psychiatrist testified at trial, he is a paranoid personality and would deliberately have lied without regard for the ethical or moral implications of doing so in order to gain a personal objective. The psychiatrist also testified that Biggerstaff colored his descriptions of events with so many accurate and minute details that they were extremely believable and could neither be verified nor disputed. Biggerstaff's motive in this case for taking an earlier meeting with defendant and placing it on August 30, defendant suggested, was to allow Biggerstaff to cooperate with FBI agents and speed his release from prison.

degree of materiality varies, the Court wrote in *Agurs*, depending upon which of three distinct factual situations is present in a particular case. If the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury, then a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103. If the defense makes no request, or only a general request, for nondisclosed materials, then a new trial should be had only if "the omitted evidence creates a reasonable doubt that otherwise did not exist. . . ." *Id.* at 112. The Court did not define the precise degree of materiality required in the third situation, where defense counsel makes a specific request for the evidence, but did indicate that a lesser showing of materiality is required than for a general request. A new trial is justified in these circumstances only if "the suppressed evidence might have affected the outcome of the trial." *Id.* at 104.

Because Martin made a general request for exculpatory materials before trial, the second standard of materiality applies to that evidence.[7] We agree with the district court

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[7] Defendant contends that the third level of materiality rather than the second level should apply because he made a specific request for Petroff's testimony prior to and during trial. These requests, however, were not for *Brady* materials. Instead, defendant wished to use Petroff's grand jury testimony to show that the meeting between defendant and Biggerstaff had taken place earlier in the summer of 1974 and, as a consequence, that the statute of limitations had run on the offense with which he was charged. The mere fact that materials requested by a defendant for other purposes turn out to have some value for *Brady* concerns does not convert the request to one made pursuant to *Brady*. *Cf. United States* v. *Lasky*, 548 F.2d 835 (9th Cir. 1977) (request for named reports held insuffi-

(footnote continued)

that, in light of all the other firm, credible testimony given at trial, the suppressed grand jury transcript or the trial testimony of Petroff would not have created a reasonable doubt that did not otherwise exist. Indeed, it appears that the testimony would not have affected the outcome of the trial at all. Petroff testified to the grand jury about events that had occurred nearly five years earlier. His uncertainty as to the exact date of the meeting and other details does not rebut or impeach in any substantial way statements made by other witnesses who agreed that the meeting between defendant and Biggerstaff took place at the end of August 1974. *Cf. United States* v. *Fontaine*, 575 F. 2d 970 (1st Cir. 1978) (suppression of inconclusive tapes and voice comparison test in context of other evidence against defendant did not result in due process violation). Considered in the light of the record as a whole, the transcript's impact (or that of Petroff if he had been called at trial) would have been slight at best and therefore not material in the constitutional sense required by *United States* v. *Agurs*.

(footnote continued)
ciently specific to implicate lower materiality standard of *Agurs*). Where a request is not made in the context of *Brady*, the defense cannot invoke the lower *Agurs* materiality standard and claim that a prosecutor deliberately failed to turn over—or recklessly failed to notice the asserted significance of—allegedly exculpatory material drawn to his attention as such. *See United States* v. *Keough*, 391 F.2d 138, 147 (2d Cir. 1968) (requirement of "suitable" request for document). *See generally* 8 MOORE'S FEDERAL PRACTICE, 2d ed. ¶ 16.06[1] at 16-94.5 (specific requests considered in context of motion to produce *exculpatory* evidence). When a document is requested for non-*Brady* purposes the prosecutor is not on notice that the defense believes exculpatory evidence is contained therein. The standard to be applied in such situations thus, is the higher one that attaches to the prosecutor's general duty to be alert for evidence that is material to the defendant's case. *Cf. Keough*, 391 F.2d at 147-148.

III.

Defendant also seeks reversal on the ground that the stolen jewelry he allegedly received from Biggerstaff on August 30, 1974, had ceased moving in interstate commerce as required by 18 U.S.C. § 2315 to confer jurisdiction on the federal government and to make their receipt a federal crime. Defendant argues that the only crime described by the evidence at trial was of a purely intrastate nature and therefore subject only to the laws of Indiana.

Under § 2315 stolen goods must retain their interstate character at the time defendant receives them. *United States* v. *Pichany*, 490 F.2d 1073, 1077 (7th Cir. 1973). Mere proof of some prior interstate movement of stolen goods is not sufficient. *Id.*, *Wolf* v. *United States*, 36 F.2d 450 (7th Cir. 1929). The accused need not know that the stolen goods are moving in interstate commerce, but the transfer of the goods must be one step in a total scheme of interstate transportation. *United States* v. *Pichany*, 490 F.2d at 1077.

Defendant contends that the evidence does not show that there was a single, grand scheme of interstate theft and transportation involved in this case because there was no real purpose in taking the Evansville diamonds to Kentucky before adding them to other stolen jewelry at Biggerstaff's home in Hobart, Indiana. The goods stolen in the robberies, he asserts, were often taken to the homes of those involved in the thefts without regard to the state in which they lived. He additionally argues that he was unaware of the existence of the stones until after their theft and transportation and that the diamonds had "come to rest" when taken to Hobart for eventual sale because there was no evidence to show any specific plan to sell the stolen jewelry to defendant or to dispose of it after interstate transportation.

Defendant's arguments are without merit. Although it is possible for an article moving in interstate commerce to lose that character at any moment, *Schwachter* v. *United States*, 237 F.2d 640, 644 (6th Cir. 1956), a jury need not conclude that an item once moving in interstate commerce has "come to rest" and lost its interstate character simply because it has reached the state where it is sold or intended to be sold. *United States* v. *Tobin*, 576 F.2d 687, 692 (5th Cir. 1978). Under § 2315 the interstate nature of a particular transaction is a question of fact for the jury, and its decision must be affirmed if substantial evidence supports its determination, *United States* v. *Pichany*, 490 F.2d at 1077, viewed in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Rabin*, 316 F.2d 564, 567 (7th Cir. 1963).

There is sufficient evidence in the record to support the jury's determination that the diamonds had not come to rest and lost their interstate character when defendant received them. Biggerstaff testified, for example, that the express purpose of transporting the jewels to Hobart was to try to sell them to defendant. The day after Biggerstaff arrived in Hobart, he initiated efforts to contact defendant and sold the jewels to him a few days later. In light of this and other similar evidence it was not unreasonable for the jury to conclude that Biggerstaff specifically planned to sell the diamonds to defendant and that the two jewels were moving in interstate commerce when defendant received them. We therefore affirm the jury's determination.

AFFIRMED.

APPENDIX III

Unpublished per curiam order
JUDGMENT — ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
June 10, 1981
Before

Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Abraham Lincoln Marovitz, Senior District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-2469 vs.

GINO MARTIN, a/k/a "Blacky"

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 79-CR-20
Phil M. McNagny, Jr., *Judge*.

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the order of this court entered this date.

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* The Honorable Abraham Lincoln Marovitz, Senior District Judge of the Northern District of Illinois, is sitting by designation.

APPENDIX IV

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 13, 1981
Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Richard D. Cudahy, Circuit Judge
Hon. Abraham Lincoln Marovitz, Senior District Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 79-2469 vs.

GINO MARTIN, a/k/a "Blacky,"
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 79-CR-20
Phil M. McNagny, Jr., *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for the defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Abraham Lincoln Marovitz, Senior District Judge of the Northern District of Illinois, is sitting by designation.